89-301

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

JOHN MONROE, ET AL

APPELLANTS

V.

CITY OF WOODVILLE
MISSISSIPPI, ET AL

APPELLEES

ON APPEAL FROM A THREE-JUDGE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI

JURISDICTIONAL STATEMENT

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July 31, 1989

QUESTIONS PRESENTED

1. When state law requires that an election be held for a municipal office and holding an election is a past practice of a municipality does the municipality's failure to hold an election as required by state law constitute a voting change within the meaning of Section 5 of the Voting Rights Act?

2. In a private enforcement Section 5 voting rights case does a plaintiff have to show that a voting change has been willfull, intentional or deliberate?

LIST OF PARTIES

The parties to the proceeding below were the appellants JOHN MONROE, JIMMY HARRIS, JOHN GREEN and all others similarly situated and the appellees CITY OF WOODVILLE, MISSISSIPPI, RON SENKO, IN HIS CAPACITY OF MAYOR, AND CHARLES JAMES, GARY D'QUILLA, TIM SESSIONS, AS MEMBERS OF WOODVILLE, MISSISSIPPI BOARD OF ALDERMAN, JOE TOWNSEND, MARY MAGEE, AND HERBERT CURRY, AS MEMBERS OF THE CITY ELECTION COMMISSION AND FRANCES TOWNSEND AS CITY CLERK.

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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN MONROE, ET AL

v.

CITY OF WOODVILLE, MISSISSIPPI
ET AL

ON APPEAL FROM A THREE-JUDGE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI

OPINION BELOW

The opinion of the three-judge district court for the Southern District of Mississippi which decided the instant case is unreported and is set out in Appendix "A".

JURISDICTION

This is an appeal from an interlocutory judgment of a three-judge district court construing issues raised by appellants under Section 5 of the Voting rights Act of 1965, as amended, 42 U.S.C. Section 1973c. The judgment of the three-judge District Court was entered on April 25, 1989. Appellants filed a timely notice of appeal in the United States District Court for the Southern District of Mississippi, on May 25, 1989. (See Appendix B). The jurisdiction of the court is invoked pursuant to 28 U.S.C. Sections 1253, 2101, and 2284 and 42 U.S.C. Section 1973c. This court has jurisdiction of the appeal. *N.A.A.C.P. v. New York*, 413 U.S. 345, 353-356 (1973); *Allen v. Board of Elections*, 393 U. S. 544, 560 (1969); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967)

STATUTORY PROVISIONS INVOLVED

The case involves 42 U.S.C. Section 1973c. A copy of the text of this statute is attached as Appendix D.

STATEMENT OF THE CASE

Woodville is a poor rural town located in the extreme Southwestern corner of the State of Mississippi. The town has a population of 1,512 persons of whom 64.3% are black. *Monroe v. City of Woodville, Miss.*, 688 F. Supp. 255, 256 (S. D. Miss. 1988). Mississippi is covered by Section 5 of the Voting Rights Act. *Pendleton v. Heard*, 824 F. 2d 448 (5th Cir. 1987). The town operates under a special charter issued by the State of Mississippi. [App. E29, E32, E41].

Tne original town charter vested the mayor and board of aldermen, the town's governing authority, with the discretion to appoint the town marshall. At that time, the town marshail was the town's chief law enforcement officer. On February 22, 1890, the Mississippi Legislature amended the town's charter to require that the town marshall position be an elected one. [App. E29, E41].

Regularly scheduled elections were held for town marshall every four years from 1890 until 1973. [App. E29, E32, E36-E39]. In 1973, the last town marshall, Fred McCarstle, a white male, was elected. [App. E37]. His last term of office was to have been from July, 1973 until June, 1977. However, Mr. McCarstle died in 1977.[1]

[1]State law in effect in 1977 provided that if more than six months remained on Mr. McCarstle's term of office when he died, a special election was required to fill his vacant position. Section 21-11-9, Miss. Code Ann. (1972), repealed by Laws, 1986, Ch. 495, Section 329, effective January 1, 1987. If less than six months remained on his term of office when he died, then the town's board of aldermen and mayor should have appointed someone to fill his unexpired term. Section 21-15-5, Miss. Code Ann. (1972), repealed by Laws, 1986, Ch. 495, Section 329, effective January 1, 1987.

Under state law, once Mr. McCarstle's term expired in June, 1977 without any person filling his position and no person qualifying to run for the 1977-1981 term, then, the town's governing authority had to declare the position vacant and call a special election to fill the unexpired 1977-1981 term of office. *State ex rel Doolittle v. Hays*, 91 Miss. 755, 45 So. 728, 729 (1908).

Special elections were required to fill vacancies for the 1981-1985 and 1985-1989 terms.

[E32]. After his death in 1977, no other marshall was ever elected or appointed. The position has remained vacant. [App. E32].

State law required that the vacancy for the town marshall's position be filled by special election. See Section 21-11-9, Miss. Code Ann. (1972), repealed, and successor statute, Section 23-15-857 (Supp. 1988).

On February 7, 1977, the mayor and board of aldermen for Woodville passed a resolution requesting the Mississippi Legislature to repeal the town's charter provision mandating an election for town marshall and to give them the discretion to appoint the marshall. This resolution became operative and effective the date it was passed. [App. E29-30. This resolution has never been submitted for Section 5 review. [App. E25-28, E40].

On April 11, 1977, the Mississippi Legislature enacted Chapter 931 of the Laws of 1977 repealing the town's charter provision mandating elections for town marshall and vesting in the mayor and aldermen the discretionary authority to appoint the marshall. [App. E27] This statute has never been submitted for Section 5 review. [App. E27, E40].

No election was held in Woodville for town marshall in 1977 nor since then. [E41]. The town has admitted that it has never sought Section 5 review of their failure to hold elections for town marshall since 1973. [App. E40]. On March 8, 1988, plaintiffs[2] filed the instant Section 5[3] action challenging Woodville's implementation of a

[2]The named plaintiffs were John Monroe, Jimmy Harris, John Green, and all others similarly situated. They were all black registered voters in Woodville.

[3]42 U.S.C. 1973c. See Appendix D.

voting change without first obtaining preclearance.[4] The action was certified as a class action on December 1, 1988, with the class defined as all black registered voters in Woodville, Mississippi.

The challenged voting change concerned Woodville's changing the position of town marshall from an elected to an appointed position.[5] On January 12, 1989, plaintiffs filed a motion to convene a three-judge district court[6] and for summary judgment with supporting documents. A three-judge court was constituted on January 17, 1989. And, the defendants filed their response, with attachments, to plaintiffs' motion for summary judgment on February 6, 1989 and supplemental responses on March 1, 1989 and March 24, 1989.

The three-judge panel held a hearing on plaintiffs' motion on March 24, 1989. At the conclusion of the hearing, the panel rendered a bench opinion holding that plaintiffs had not proven that a change in voting had occurred with respect to the town marshall position. [App. A2-A7]. Pursuant to their bench opinion, the trial court entered a formal order[7] denying plaintiffs' motion

[4]Under Section 5, 42 U.S.C. 1973c, preclearance may be obtained by either of two ways. One, a covered jurisdiction may submit a voting change to the United States Attorney General for administrative preclearance. Or, two, the covered jurisdiction may obtain a declaratory judgment from the United States District Court for the District of Columbia that the voting change does not have a discriminatory purpose or effect. See Rhodes, *Enforcing the Voting Rights Act in Mississippi Through Litigation*, 57 Miss. L. J. 705, 708 n. 13 (1987)

[5]At oral argument on plaintiffs' motion for summary judgment, plaintiffs clarified the voting change being challenged. Plaintiffs asserted they were challenging the failure to hold elections for the position of town marshall as required by state law and consistent with the city's past practices. [See Appendix E8-E11, E41-E42]

[6]A three-judge panel is required to hear Section 5 issues. 42 U.S.C. 1973c. *Lockhart v. United States*, 460 U. S. 124 (1983).

[7]The order denying plaintiffs' motion for summary judgment is a technical error. Although plaintiffs clearly sought injunctive relief under Section 5 of the Voting Rights Act, the order denying plaintiffs' relief was signed by a single judge of the three-judge panel. This was a technical mistake. The three-judge panel denied plaintiffs' request for injunctive relief contained in their motion for summary judgment. The order denying that relief should have been signed by all three judges. *United States v. Georgia Public Service Commission*, 371 U. S. 285 (1963).

for summary judgment on April 25, 1989.

Plaintiff's filed their Notice of Appeal on May 25, 1989 and filed an Amended Notice of Appeal on May 30, 1989.[8]

On Tuesday, July 25, 1989, Associate Justice Byron White granted them until Tuesday, August 1, 1989 in which to docket their appeal.

THE QUESTION IS SUBSTANTIAL

The question presented by this appeal is substantial because it raises two important issues concerning the breath and scope of Section 5 of the Voting Rights Act. First, where state law mandates the holding of a special election to fill a municipal vacancy and the municipality does not hold such an election is that a change within the meaning of Section 5. Second, in a private enforcement Section 5 action, do the protected minorities have to prove that a voting change implemented by a municipality is a wilful act or has a discriminatory purpose or effect.

Since state law requires that some action be taken by the governing authority of a municipality when a vacancy occurs, inaction by that authority constitutes a change under Section 5. See note 1 supra. This court has held in *Allen v. Board of Elections*, 393 U. S. 544 (1969) that Section 5 was aimed to the subtle as well as the obvious changes which have the effect of denying citizens the right to vote. The court held that Section 5 should

[8]The only difference between the two notices of appeal is that the first notice indicated the appeal was from a final judgment whereas the amended notice correctly reflects that the appeal is from an interlocutory order.

[9]This court stated in *Allen* as follows:

The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way. For example, Section 2 of the Act, as originally drafted, included a prohibition against any "qualification or procedure." During the Senate hearings on the bill, Senator Fong expressed concern that the word "procedure" was not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote. In response, the Attorney General said he had no objection to expanding the language of the section, as the word procedure was intended to be all inclusvie of any kind of practice." *Id.* at 566.

have the broadcast possible interpretation.[9]

The pivotal inquiry presented in this appeal is twofold. First, a question is how does a voting change occur? Second, an underlying question is when does a change occur? The three-judge panel indicated that a voting change occurs only when a covered jurisdiction takes formal action to firmly implement their policy choices. [App. E2-3, A3-5]. Conversely, the panel indicated that if a covered jurisdiction, after enacting their policy choices, takes informal actions, or takes no action at all when required to do so, then a change in voting has not occurred. Such a holding, if adopted in other jurisdictions covered by Section 5,[10] would seriously erode settled law defining the scope of Section 5.[11]

Plaintiffs proved that the town marshall was an elected position in Woodville until 1977. [App. E29-30, E32]. In 1977, the board of aldermen passed a resolution stating their policy choice to make the marshall position a discretionary appointed one.[12] The resolution was to become effective after the state legislature amended the town's charter to eliminate the requirement of an

[10]Currently nine states and parts of seven others, including Mississippi, are covered by Section 5 of the Act. Appendix-Jurisdictions covered under Section 4(b) of the Voting Rights Act, as amended, 28 C.F.R. Part 51 (1988); Rhodes, *Enforcing the Voting Rights Act in Mississippi Through Litigation*, supra. ,

[11]In *Lucas v. Townsend*, 486 U. S.____, 108 S. Ct. 1763 (1988) (Kennedy, J., in chambers), a three-judge panel in Georgia held that the discretionary setting of the date of a special election was not a change in voting. Justice Kennedy, in enjoining a school bond referendum, noted that the three-judge panel's conclusion was most problematic under Supreme Court precedent.

Likewise, the holding by the three-judge panel in this case is most problematic under Supreme Court precedents, e.g., *Allen v. Board of Elections*, supra at 565 (Section 5 covers subtle as well as obvious changes); *N.A.A.C.P. v. Hampton County Election Commission*, 470 U. S. 166 at 176 citing *Allen v. Board of Elections*, supra at 567 ("Section 5 is to be given broad scope"); *N.A.A.C.P. v. Hampton County Election Commission*, supra at 175 n. 19 (timely submission of proposed changes before implementation is required); *Hathorn v. Lovorn*, 457 U. S. 255, 256 n. 16 (1982) ("Section 5 applies 'o any change reflecting the policy choices of the elected representatives of the people").

[12]This resolution was never submitted for Section 5 review. Therefore, it was void and unenforceable. *Connor v. Waller*, 421 U. S. 656 (1975) (per curiam); *McCain v. Lybrand*, 465 U. S. 236, 245 (1984); *United States v. Onslow County*, 683 F. Supp. 1021, 1023 (E.D. N.C. 1988) (three-judge court); *Haith v. Martin*, 618 F. Supp. 410, 414 (E. D. N.C. 1985) (three-judge court).

election. The legislature did, indeed, pass the statute abolishing elections for marshall and granting the aldermen the discretion to fill the position by appointment.[13] Neither of these two voting changes was precleared. Therefore, both were unenforceable. Since they were unenforceable, Woodville had to conduct general elections in 1977, 1981, 1985, and 1989[14] to fill the position. The town's charter in effect prior to 1977 and past practices required elections. More importantly, state law in effect at the time required that vacant elective positions be filled by special elections. See *State ex rel Doolittle v. Hays,* 91 Miss. 755, 45 So. 728 (1908); Section 21-11-9, Miss. Code Ann. (1972), repealed and successor statute, Section 23-15-857, Miss. Code Ann. (Supp. 1988).

However, since 1977, Woodville has not had a town marshall election, either general or special. The town's governing officials have held elections for all other elective positions in the town. Simply put, the board of aldermen have not held elections for marshall when required to do so by state law and consistent with the town's past practices As such, there has been a voting change with respect to the town marshall position by inaction of the board.

The three-judge panel's decision that a voting change has not occurred until after a covered jurisdiction enacts a formal document stating that the change has been effectuated contravenes settled precedents, e.g., *Allen v. Board of Elections,* supra; *Hathorn v. Lovorn,* supra, *N.A.A.C.P. v. Hampton County Election Commission,* supra. This requirement places an onerous burden on protected minorities to produce a smoking gun in order

[13]The state statute was never submitted for Section 5 review. Therefore, it was void and unenforceable. See Note 12, supra.

[14]Although the appellees passed a resolution on February 12, 1989, which was precleared on May 2, 1989, abolishing the town marshall position, preclearance of the resolution does not moot plaintiffs' Section 5 issues. Preclearance of the 1989 resolution did not preclear the 1977 state statute or 1977 town resolution. Those issues are alive. See *McCain v. Lybrand,* supra.

If the state or Woodville submits the 1977 statute for preclearance and the United States Attorney Genral objects, then the town would have to restore the town marshall position as an elected position. See *McCain v. Lybrand,* supra at 250-251.

to prove that a change in voting has occurred. Whenever, as here, elected representatives make policy choices (1977 town resolution) that are self enacting[15] (requiring no further action before a voting change becomes effective), a change in voting has occurred, *Hathorn v. Lovorn,* supra.

CONCLUSION

On the basis of the foregoing reasons and authorities cited, this court should note probable jurisdiction, reverse the action of the three-judge panel, and render a decision, or in the alternative, remand the case to the three-judge panel for further considerations.

Respectfully submitted,

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July 31, 1989

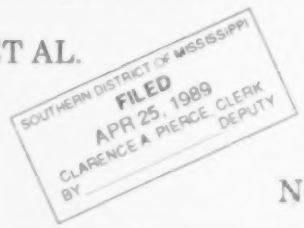
[15]The town's 1977 resolution callilng for the discretion to appoint the town marshall instead of electing hin automatically became effective upon the Legislature passing a law giving the town the authority not to hold elections. The legislation was passed on April 11, 1977. After then, the town never had another election for marshall. Neither the resolution or statute was precleared. As such, they were ineffective as law. *Connor v. Waller,* supra.

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, ET AL.



PLAINTIFFS

VS.

NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI, ET AL.

DEFENDANTS

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This cause, having come on to be considered on the Plaintiffs' Motion for Summary Judgment regarding the positions of Town Marshall and Election Commissioner in Woodville, Mississippi, and the Court having considered documents of records, testimony adduced by Plaintiffs, and argument of counsel, and after having issued its findings of facts and conclusions of law in a bench opinion which is incorporated herein by reference, finds that said Motion is not well taken and should be denied.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment be and hereby is denied, and that this Court specifically denies Plaintiffs' request for injunctive relief regarding the positions of Town Marshall and Election Commissioner in the Town of Woodville, Mississippi.

ORDERED this the 24th day of April, 1989.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN MONROE, JIMMY HARRIS,
JOHN GREEN, AND OTHERS
SIMILARLY SITUATED

PLAINTIFFS,

V. CIVIL ACTION NO. W88-0029(B)

CITY OF WOODVILLE,
MISSISSIPPI, ET AL

DEFENDANTS.

BENCH OPINION

BEFORE:
THE HONORABLE E. GRADY JOLLY, JR.
THE HONORABLE WILLIAM H. BARBOUR, JR.
THE HONORABLE TOM S. LEE
UNITED STATES DISTRICT JUDGES

DATE: MARCH 24, 1989

PLACE: JACKSON, MISSISSIPPI

APPEARANCES:

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JUDGE JOLLY: We are going to do the best we can here about ruling on this case without the benefit of any law clerk advice. The judges cannot move very effectively if we don't have law clerks and we didn't have their advice on this so we may not be as smooth as we usually are.

With respect to Woodville and the Town Marshal, our basic finding is that the Plaintiffs in that case have not demonstrated that there was a change. The burden was on you to demonstrate that there was a change in the voting practice and procedure.

Now, there was the resolution before the enabling statute that indicated the intent of the City. But after the enabling statute was passed, there was no formal resolution or any other evidence that the City had actually abolished the office as an elective office.

That would not preclude you as Plaintiffs from showing that it had been abolished if you could come forward with the evidence that might demonstrate that. So we looked at the evidence that you came forward with and the evidence that generally existed.

Now, your basic argument and the evidence that you asserted most strongly was that no notice had ever been given that the office was open for elections. Now, with respect to that, we don't think that you carried your burden in that sense because although there may not have been any notice as such that there would be an election for a Marshal, we do not find that that had been a former practice based upon the oral testimony here and based upon any kind of evidence.

Now, as far as the oral testimony here is concerned, we weren't quite sure that we understood the full impact of it because as we understood it there was simply no evidence that was given on the witness stand that there was a practice of formal notice that each particular office would have an election and everybody invite people to come down and qualify, which was essentially your position.

In any event, we find that to the extent that we may have misunderstood the oral testimony, that the best

evidence rule applies in that you had the burden of trying to sustain your motion for summary judgment. And you did not come forward in the documentary evidence that would show that they had previously published a notice inviting people to qualify for this office and that after 1977 they failed to publish such a notice to indicate their clear intention that they had abolished the office.

The further evidence that convinced us was that it had not been abolished, that you produced no evidence that anybody had ever been denied. Now, if you could have come forward with someone who went down and says, I want to run for Marshal; and the Town Father says, that job has been abolished so we're not going to let you. That would have been very strong evidence. But unfortunately there was no evidence that any person, black or white, had ever attempted to run for the job and had been denied the job.

All of that has to be considered against the City's contention that we view skeptically that the job had not been abolished because there was some evidence that they had at least intended to abolish the office and perhaps had never gotten around to it.

The burden remained on the Plaintiffs to show that there had been a change. The evidence also, of course, that the Police Chief, and that was part of the evidence, I think, that perhaps the Plaintiffs were suggesting, that the Police Chief has assumed the role of the Marshal. Well, we looked at that and found that the Police Chief existed at the same time that the Marshal's office was and it was not an office that had been created as a subterfuge for the office of Town Marshal that they intended to abolish.

We, as I say, looked at the contention of the City that they had never abolished the office and that simply nobody had ever come forward to qualify for the office. And that was fairly demonstrated by the lack of evidence on the part of the Plaintiffs or any other evidence that came to our attention that indeed nobody had qualified for the office after 1977.

So I think our decision is also influenced by the fact

that the City takes the position now that if you want to come down and attempt to qualify, pay your money and attempt to qualify for the position of the Marshal, you are free to do so now, thus indicating that as far as the City records are concerned and as far as the City action is concerned, no action is required on their part to reinstitute the Marshal's job in order to make it available the way the vote is now.

So certainly I would point out that the Plaintiffs in this case have not been harmed if today you can, as the City has indicated, go down and qualify for that particular job.

As a finding of fact we find that the Plaintiffs have not met their burden of showing that there was a change in the sense that the job was abolished. There just is no convincing evidence that it was, in fact, abolished.

And hence we find as a fact that there was no change in a voting practice or procedure within the meaning of Section 5.

Now with respect to the Election Commissioners. As we understand that case, there is no genuine issue of fact, or no genuine issue of material fact with respect to the summary judgment that is pending before us.

As to the fact that the reason that the City began appointing Election Commissioners was because no one offered for the job. There was no evidence that that is not a fact.

There was no evidence adduced that there had ever been a change in the voting procedure. There was no evidence that was before us that the City had declared those to be appointed positions and that nobody could run for them. There had been no evidence suggested, as there had been in the case of the Marshal, the pre-enabling statute resolution was passed by the City. There was no such evidence that would even suggest here that the City had ever intentionally or deliberately or otherwise eliminated from the election procedures the Election Commissioners.

The testimony was that they had to have some Election Commissioners and that the only way that they could get them was to appoint them. And, again, we didn't see that that was any evidence that would

preclude summary judgment for our making the conclusion that that was a fact for purposes of summary judgment.

Now, of course, you can argue and point out, and there is some validity to it that even though there was no change in the election procedure, and even though no one would step forward to qualify for the Election Commissioner, that the mere fact that the City appointed these previously elected jobs was a change within the Voting Rights Act even though these people, apparently from the City's point of view, at least, and one that we accept from the record before us, that this was a stop-get measurement that was justified or required only because no one would offer for election. Even if there is a change in practice that would be subject to Section 7 of the Voting Rights Act, we found that the intervening statute, in effect, mooted any claim that that was a violation of Section 5 requiring a preclearance because in 1986, and the law was made effective, I believe, January 1, 1987, the Justice Department had authorized and had cleared a statute that required the appointment and not the election of these Election Commissioners. And for that reason we find that Section 5 was mooted by the preclearance of the statute.

As far as the persons continuing to serve after January, 1987, it is our opinion that they were ratified by their continuing service at the pleasure of the City Council and the Board of Aldermen and the Mayor.

We would also note, though, that the Election Commissioners, especially as they exist in Woodville, Mississippi, has very insignificant function; that the primary function of conducting elections is done in terms of the Democratic party; the Election Commissioners that are appointed simply serve a perfunctory service in the general election that has been over the years and continues to be essentially meaningless.

We would also note in passing that any kind of relief with respect to the voting commissioners in Woodville is almost meaningless. And that is because if we granted the relief that we understand is being asked for or that

would be appropriate under these circumstances to correct or remedy any wrong as a result of violation of Section 5 of the Voting Rights Act, would be to remove these persons from office and to hold special election and let them serve between now and May 2, when after June, I guess it would be, after the new Mayor and Board of Aldermen take effect, they would simply appoint new Election Commissioners under the 1987 Act. And since there would be, I guess, maybe one general election that might occur while they would be in service, they would have no real function to perform and that the remedy that you seek is essentially meaningless.

So with respect to both the Town Marshal and the Election Commissioners, we find that the fact was that there was no change in any voting practice or procedure and deny the motions for summary judgment. And specifically deny the request for injunctive relief.

(Recess.)

****

CERTIFICATE

I, Celeste O. McClelland, Registered Professional Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 8 pages contain a full, true, and correct transcript of the proceedings had in the aforenamed case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 10th day of April, 1989.

Celeste O. McClelland

Celeste O. McClelland

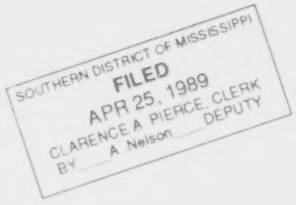
My Commission Expires:
June 29, 1991

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, JIMMY HARRIS AND
JOHN GREEN AND OTHERS SIMILARLY
SITUATED

PLAINTIFFS



VS.

NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI
RON SENKO, IN HIS CAPACITY OF MAYOR,
AND CHARLES JAMES, GARY D'QUILLA,
TIM SESSIONS, AS MEMBERS OF WOODVILLE,
MISSISSIPPI BOARD OF ALDERMEN, JOE
TOWNSEND, MARY MAGEE, AND HERBERT
CURRY, AS MEMBERS OF THE CITY ELECTION
COMMISSION AND FRANCES TOWNSEND AS
CITY CLERK

DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, above named, hereby appeal to the Supreme Court of the United States from the final order and judgment entered in this action on April 25, 1989, by a district court of three judges, convened pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973(c), denying plaintiffs' motion for summary judgment and for declaratory judgment and request for a temporary restraining order and preliminary and permanent injunction and granting the defendants' motion for summary judgment on all Section 5 issues, and dissolving the three-judge court.

This appeal is taken pursuant to 28 U.S.C. Sections

1253 and 2284 and 42 U.S.C. Section 1973(c).

Respectfully submitted,

CARROLL RHODES
P. O. Box 588
Hazlehurst, MS 39083
(601)894-4323

DEBORAH A. MCDONALD
SOUTHWEST MS LEGAL SERVICES
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WILLIE L. ROSE
P. O. Box 5300
Jackson, MS 39296-5300
(601)987-4265

CERTIFICATE OF SERVICE

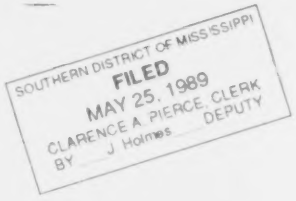
I, Carroll Rhodes, one of the attorneys for the plaintiffs, hereby certify that I have this day mailed, by the United States Mail, a true and correct copy of the above and foregoing Notice of Appeal to Honorable Dennis Horn, P. O. Box 1725, Jackson, Mississippi 39215, attorney for the defendants.

This, the 24th date of May, 1989.

Carroll Rhodes
CARROLL RHODES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, JIMMY HARRIS AND
JOHN GREEN AND OTHERS SIMILARLY
SITUATED



PLAINTIFFS

VS.

NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI,
RON SENKO, IN HIS CAPACITY OF MAYOR,
AND CHARLES JAMES, GARY D'QUILLA,
TIM SESSIONS, AS MEMBERS OF WOODVILLE,
MISSISSIPPI BOARD OF ALDERMEN, JOE
TOWNSEND, MARY MAGEE, AND HERBERT
CURRY, AS MEMBERS OF THE CITY ELECTION
COMMISSION AND FRANCES TOWNSEND AS
CITY CLERK

DEFENDANTS

AMENDED NOTICE OF APPEAL

Notice is hereby given that plaintiffs, above named, hereby appeal to the Supreme Court of the United States from the order and judgment entered in this action on April 25, 1989, by a district court of three judges, convened pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973(c), denying plaintiffs' motion for summary judgment and for declaratory judgment and request for a temporary restraining order and preliminary and permanent injunction.

This appeal is taken pursuant to 28 U.S.C. Sections 1253 and 2284 and 42 U.S.C. Section 1973(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carroll Rhodes, one of the attorneys for the plaintiffs, hereby certify that I have this day mailed, by the United States Mail, a true and correct copy of the above and foregoing Amended Notice of Appeal to Honorable Dennis Horn, P. O. Box 1725, Jackson, Mississippi 39215, attorney for the defendants.

This, the 25th date of May, 1989.

Carroll Rhodes
CARROLL RHODES

APPENDIX C

SUPREME COURT OF THE UNITED STATES
No. A-69
JOHN MONROE, ET AL.,

Applicant,

v.

CITY OF WOODVILLE, ET AL.

ORDER EXTENDING TIME TO DOCKET AN APPEAL

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1989.

Byron R. White
Association Justice of the Supreme Court of the United States.

Dated this 25th
day of July, 1989.

APPENDIX D

§1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the

court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforce without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court.
(Aug. 6, 1965, P. L. 89-110, Title I, § 5, 79 Stat. 439; June 22, 1970, P. L. 91-285, §§ 2, 5, 84 Stat. 314, 315; Aug. 6, 1975, P. L. 94-73, Title II, §§ 204, 206, Title IV, § 405, 89 Stat. 402, 404.)

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN MONROE, JIMMY HARRIS, ET AL,
JOHN GREEN, AND OTHERS SIMILARLY SITUATED

PLAINTIFFS,

V. CIVIL ACTION NO. W88-0029(B)

CITY OF WOODVILLE
MISSISSIPPI, ET AL

DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE GRADY E. JOLLY
THE HONORABLE
WILLIAM H. BARBOUR, JR.
THE HONORABLE TOM S. LEE,
UNITED STATES DISTRICT JUDGES

DATE: MARCH 24, 1989

PLACE: JACKSON, MISSISSIPPI

APPEARANCES:

COUNSEL FOR PLAINTIFF:
MR. WILLIE L. ROSE
MS. DEBORAH McDONALD
MR. CARROLL RHODES

COUNSEL FOR DEFENDANT:
MR. DENNIS L. HORN

COURT REPORTER:

THE CLERK: Civil Action Number W88-0029(B), John Monroe, et al., versus City of Woodville, Mississippi, et al.

JUDGE JOLLY: Is the Plaintiff ready?

MR. ROSE: Plaintiff is ready.

JUDGE JOLLY: All right.

MR. HORN: Defendant is ready, Your Honor.

JUDGE JOLLY: You may proceed.

MR. ROSE: Your Honor, before I get started, I would just like to request of the Court, my co-counsel, Carroll Rhodes, would like to share argument with me in this matter if it's all right with the Court.

Also, we have attached to our motion for summary judgment, and I believe a motion for the convenience of this Three-Judge Panel, several exhibits. Is it necessary for us to now introduce those exhibits or are they part of the Court's record now?

JUDGE JOLLY: You attached them to your motion for summary judgment?

MR. ROSE: Yes, sir.

JUDGE JOLLY: We will treat them as part of the file.

MR. ROSE: Thank you. Your Honor this case is a Section 5 case that is brought pursuant to Section 5 of the Voting Rights Act. And in this case we challenge the City of Woodville method of making two formal changes in the voting practice and procedure. One change was that prior to 1965 -- up to 1965 -- up to 1977 the City of Woodville elected a Town Marshal. At that time, 1977, City of Woodville passed a resolution abolishing this Town Marshal and combining it with Chief of Police and requesting that the State Legislature approve it. That same year the State Legislature did, in fact, approve that change. And from then on since, the year 1963, City of Woodville have not elected or attempted to hold any election for a Town Marshal. But --

JUDGE JOLLY: The state legislature was enabling legislation; was it not?

MR. ROSE: No, sir, Your Honor -- well, yes, sir, it was enabling --

JUDGE JOLLY: In other words, it did not accomplish the act which enabled the City of Woodville to

accomplish that act if in its discretion chose to do so.

MR. ROSE: That's exactly right, Your Honor. But that --

JUDGE JOLLY: Is there any evidence that after the enabling act the legislation passed that the City of Woodville took any steps to abolish the Chief of Police's job as a position?

MR. ROSE: Yes, sir. It really did. And plenty of it evidences the fact that since that time City of Woodville have not had a election for the Town Marshal position. As a matter of fact, since 1977 up until present, they have not attempted --

JUDGE JOLLY: But there's no official document?

MR. ROSE: Well, it's not any official document, it would be the lack of a document I think that would really prove that they have not done it. They just simply did not have the election. They have not made any effort to have elections. And I think when you --

JUDGE BARBOUR: How does the City hold an election if nobody bothers to go down and qualify for a position?

MR. ROSE: Yes, sir. Well, Your Honor, it's like this, the City of Woodville would require prior to this time before they implemented this change, they would have the Town Marshal election at the same time they would have the Alderman and Mayor election. Common year -- 1977 they had an election, but they did not have an election for the Town Marshal nor did they have an election for the Election Commission.

JUDGE BARBOUR: Nobody attempted to qualify for those positions, did they?

MR. ROSE: No, sir, Your Honor, they weren't given the opportunity.

JUDGE BARBOUR: Why weren't they?

MR. ROSE: The City did not get a public notice that we were having a election. The notice was not sent out, the notice just simply stated that we have an election for our Town Mayor and Alderman. No notice stated that we are holding election for Town Marshal.

JUDGE BARBOUR: Was there a notice of elections for Mayor and Alderman?

MR. ROSE: Your Honor, the paper would indicate that there was a notice given as to Mayor and Town Marshal -- not Marshal but Mayor and Alderman.

JUDGE LEE: Is that reflected in one of your exhibits to the motion?

MR. ROSE: We did not attach that to one of our exhibits, that's true.

JUDGE LEE: Do you know that to be true or do you just assume it?

MR. ROSE: Well, I can vouch for the fact that I've examined the records. I examined the records and I seen the record where they stated who was running for office. They stated we're holding a Mayor election, we're holding the election for Alderman, but nothing had been stated, nothing was ever stated. I can call witnesses here today if so be and say they have not ever received a notice from 1977 that the City was having an election for the Town Marshal.

If you examine the record, Your Honor --

JUDGE JOLLY: Let's try to get this down precisely, Mr. Rose. We know that there's been no notice sent out to the citizens or published in the paper that says that there would be an election for Marshal. We assume that. But we also assume, and this is where you need to straighten us out if we're wrong, that there was no notice that said we hereby give everybody notice that we will hold elections for Mayor and for Alderman. What we assume, is what happens in every community, and that is that the notice of the City elections will be held on such and such a date. Then people qualify for those positions. And then it is announced that so-and-so is running for Mayor, so-and-so is running for Alderman. Nobody qualifies for Town Marshal. It's just by omission.

Now, is that the situation that actually occurred there as best as you can tell us?

MR. ROSE: Your Honor, what I can tell you, the way I see it is, in fact, Defendants admitted -- I asked them --

JUDGE JOLLY: Just answer my question. Am I wrong about that?

MR. ROSE:Well, I don't really want to say you're wrong but I'm not quite -- I'll answer it like this --

JUDGE JOLLY: You're not saying I'm right either.

MR. ROSE: Well, I just lay the facts out and I guess you can interpret. What normally happens in Woodville, like in any city, a citizen would not know the election is coming up unless you have a notice. No citizen. My client could not go up and say we're going to have an election for Town Marshal. That was left to the City Election Commission to call the election.

JUDGE JOLLY: They called an election, you know that.

MR. ROSE: Right. Generally when you call the election you notify the public that we're going to have an election on such and such date, this is the day to qualify and so forth. None of that happened in this case.

JUDGE BARBOUR: What is your authority for that? I've never seen an official notice of an election. There are election laws on the books that say that the primaries for Mayor and Alderman are going to be held on the second Tuesday of May of every four years. And that's by state law. Is there any provision in state law that requires the Town of Woodville or the City of Jackson or any other city to publish any kind of notice in advance of those elections that elections are going to be held?

MR. ROSE: Well, Your Honor, I can't really say for sure. I'll be honest with you. Carroll Rhodes would, in fact, be able to answer that question. He handles a lot more voting rights cases than I do. But I cannot.

But I just say it seems to me like the sensible thing to do would be that and that's not been practiced. I think the citizens would not know the election is coming up unless, in fact, some kind of notice -- but I think more important in this case is that we have asked the Defendants if they had a election. They was asked in Interrogatory Number 5 if the town have held a Town Marshal election since 1977. Their answer was no. That's an admission. They admitted that.

JUDGE JOLLY: Let me ask you this. Who is the injured party in this case?

MR. ROSE: Injured party is the black public.

JUDGE JOLLY: No. The black public has not been injured. Who is your injured party? You've got to have a

name. This is not black public versus the City of Woodville.

MR. ROSE: It has been certified by Judge Barbour as a class action.

JUDGE JOLLY: Some class member has got to have standing. Some class member has got to have been injured. I want you to tell me who was injured in this case.

MR. ROSE: Well, injured in this case certainly is the named Plaintiff as well as --

JUDGE JOLLY: How was the named Plaintiff injured?

MR. ROSE: By not being given an opportunity to elect a Town Marshal which they have a right to do. That's the injured --

JUDGE JOLLY: He has been denied a right to vote.

MR. ROSE: Right.

JUDGE JOLLY: And so have the white people. Everybody has.

MR. ROSE: The whites have been injured, too.

JUDGE JOLLY: Maybe you have got injured for purposes of Section 5.

MR. ROSE: Section 5. Blacks injured in terms of Section 5 violation.

JUDGE JOLLY: Not blacks. I mean blacks have not been injured as a class any more than whites. And the voters have been injured if that's your theory.

MR. ROSE: Right.

JUDGE JOLLY: The voters have been injured by not being given an opportunity to vote for Town Marshal.

MR. ROSE: That's true, too, but I'm saying blacks are particularly being injured.

JUDGE LEE: Why would that be?

MR. ROSE: Well, Your Honor, Section 5 of the Voting Rights Act was passed to protect the rights of minority. And the fact that Section 5 give them a protection saying that before you implement a change that you had to get preclearance.

JUDGE JOLLY: If you're relying on a discreet injury to a black person, you may be out of Court.

MR. ROSE: Not to a black person but to black voters.

JUDGE JOLLY: To black voters. There's no injury to

them that I can -- nobody has been denied the right to qualify for Town Marshal, have they?

MR. ROSE: Yes, sir. Definitely so.

JUDGE JOLLY: Who?

MR. ROSE: They have not had election for Town Marshal.

JUDGE JOLLY: Has anybody tried to qualify?

MR. ROSE: They haven't had election. They haven't been given the opportunity. If you examine the record you'll see. The last time they had the election would have been 1973. Blacks were running for Town Marshal. Blacks consistently ran for Town Marshal. And they was there until we stopped having elections. Same when you start talking about Election Commission. Blacks was constantly running until 1977.

When we talked about the enabling act that you mentioned, the enabling provision of this particular statute, we need to keep in mind what you have here. In Woodville you got, first of all, the Board of Aldermen saying we're going to implement this change, we're going to request the legislators to give permission to do that. So when the legislators granted their -- in fact, that implementation went back then to the original resolution that the City had adopted. And since that time it's just clear, it's clear as a whistle, I think that the City have not had a election.

The burden is upon them. I have requested in interrogatories, asked the City to produce any proof to this --

JUDGE BARBOUR: What would be your position if the city had run a legal advertisement in the Woodville newspaper saying qualifications for Town Marshal and Election Commissioners will be open until April something, 1977, or whatever the date might have been, and nobody had bothered to go down and qualify?

MR. ROSE: My position would probably be that, I believe, that -- once you would have -- the City, perhaps under state statute, appoint somebody to serve about 60 days, I believe, and at that time they're required to call a special election, I believe. Otherwise, they're going to appoint this guy to serve for four years. The City would

have had to require approval from the Justice Department under Section 5, which they didn't do.

JUDGE JOLLY: They would have to fill the office?

MR. ROSE: They would have to --

JUDGE JOLLY: How would they have any authority to appoint anybody for 60 days?

MR. ROSE: Well, Mississippi statute would probably miss that for 60 days but Mississippi statue says that if an office become vacant then the City can appoint somebody for 60 days but after the 60 days, you should have a election.

JUDGE JOLLY: The office didn't become vacant.

MR. ROSE: Well, that's true.

JUDGE JOLLY: The office was always vacant.

MR. ROSE: Well --

JUDGE JOLLY: The term ended, nobody ever qualified, so that statute wouldn't apply.

MR. ROSE: Well, Your Honor, I agree with the fact that nobody every served in this position but, in terms of the position being vacant, it wasn't vacant actually until March because the City didn't have a election. I agree with you in that point. They simply have not held an election. They did the same thing with the Election Commission. As the exhibit would indicate, blacks constantly have run for Election Commission until they abolished this in 1977.

I guess it's sort of like saying -- what -- Mr. Monroe can't hold a city election, it's left for the City to do it. The City have made no effort whatsoever to hold a election. It's just simple. Like the City of Jackson. If the City of Jackson does not hold election, you can't say blacks are not qualifying or not wanting to run.

So that's basically what we're saying, Your Honor. Unless there's additional questions, I would like to give my co-counsel, Mr. Carroll Rhodes, the rest of the time. But if there are any other questions from the panel, I'll be more than glad to --

JUDGE JOLLY: Thank you. Mr. Rhodes?

MR. RHODES: May it please the Court? Your Honor, to answer some of the Court's questions as to whether or not notice was given or required, Mississippi state law

permits the Town of Woodville to appoint someone to a vacant position, Section 2315857 and 859 of the Mississippi Code that was precleared by Justice Department in 1987.

JUDGE JOLLY: That allows --

MR. RHODES: Would allow them to do it but not for four years. They would have to call a special election after a certain period of time, so at some point, they have to give notice for that special election; granted they would have to get that precleared though.

JUDGE JOLLY: But the statute does not mandate that the town fill a vacant position. It allows, you said.

MR. RHODES: Your Honor, the way the statute reads, whenever any position filled by election is vacant. And this was a position that was filled by election.

JUDGE JOLLY: Are you saying "shall" appoint?

MR. RHODES: I don't recall whether it was "shall" or "may" but I think it's "shall," Your Honor. I think it's mandatory.

Your Honor, 2315857, Subsection 2: "When it shall happen that there is any vacancy in any elective office in a city, town, or village, unexpired term of which shall exceed six months, the governed authority of said city, town, and village shall make and enter on the minutes an order for election to be held at such city, town, or village."

There is no other authority under the State of Mississippi to give the Town of Woodville the authority to --

JUDGE JOLLY: That would give them the right to appoint.

MR. RHODES: To appoint for 12 years.

JUDGE JOLLY: You didn't even read anything that I heard that said they had the right to appoint, did you?

MR. RHODES: "The governed authority for a said city, town shall make the order for cause for an election."

No, Your Honor, it didn't say anything about appointing in this particular section, but there is a code section that would give them the right to appoint until they had a special election. I guess the notice will come into play. They had to give notice of a special --

JUDGE JOLLY: If there's no requirement, that's what I'm saying, is that there's no -- the state does not force the municipalities in this state to fill all vacant offices by appointment or otherwise.

MR. RHODES: Your Honor --

JUDGE JOLLY: In other words, Woodville violated no state law by not filling the Marshal's position.

MR. RHODES: Your Honor, we contend that Woodville did violate state law.

JUDGE JOLLY: How is that?

MR. RHODES: The state law --

JUDGE JOLLY: By not filling the position, that's what I'm saying. How did they violate the state law?

Let's assume Woodville's side of the case. Nobody came forward. Nobody qualified to run for Marshal so they didn't put it on the ballot, no candidates, they felt like they could get by without it. No racial reasons involved, we will assume for purposes of this question. Have they violated the state law?

MR. RHODES: Your Honor, we contend that state law would require them to call a special election to fill that vacancy. Aside from whether or not they violated the state law, they had a distinct change in practice and procedure from the time the Voting Rights Act was enacted up until 1977, they --

JUDGE JOLLY: The reason it's important, I mean, state law is only important in the subsidiary sense but it's important because you've got to show, it seems to me, and the burden would be on you to show that they, because this is your position, that they abolished the office in effect.

In other words, if they made no change, then there's no violation of Section 5, the right to preclear. But if they abolished it because they, under state law, were required to fill it and by violating state law they didn't fill it, then that was an intentional act to eliminate the job as such which would perhaps bring it under the requirement of preclearance.

MR. RHODES: Yes, sir.

JUDGE JOLLY: But unless it was a willful act on the part of the City, then it seems to me that you have a

difficult burden of showing that there was a change. So what evidence do you have, and we've heard Mr. Rose's argument and he makes some good points, evidence of a willful act that brought about a change in a preceding and an existing voting law?

MR. RHODES: Your Honor, Section 5 doesn't require Plaintiff to show that an act has been willful. The only requirement is to show that there has been a change in either practice or procedure.

JUDGE JOLLY: I understand that.

MR. RHODES: Your Honor --

JUDGE JOLLY: But there's no change unless there is a willful act. Go ahead.

MR. RHODES: The practice, Your Honor, prior to 1977, was to hold elections. In 1977 the Board of Aldermen for the Town of Woodville passed a resolution asking that the legislature enact legislation giving them the authority to abolish the position of Town Marshal. The state law in effect at that time required, and it's been subsequently precleared, and the new election code require that whenever there is a vacancy in an office, to have that vacancy filled by a special election. Woodville did not have that vacancy filled by a special election, but after that legislation was passed and in their resolution that said, upon the passage of the legislation, then the office would be abolished. After that legislation was passed, they did not hold any more elections. They did not even fill it temporarily by appointment and then call for a special election, they did not have any special election for the office of Town Marshal, let alone any regular elections.

JUDGE JOLLY: Your argument is that the resolution that they passed that stated their intentions to abolish the office had the effect of abolishing it once the enabling legislation had occurred.

MR. RHODES: The resolution is so worded, Your Honor, that it did have that. But our position is that their practice, the actual practice for the Town of Woodville is that after the enabling legislation was passed, they did not call any more elections, whether they were special elections or regularly scheduled

elections for that position.

JUDGE JOLLY: Can you shed any light on the questions that we asked Mr. Rose about whether municipalities are required to "call elections" as you say?

MR. RHODES: Your Honor, there is no state law that would require a notice to be given, but I think what Mr. Rose was speaking of more so, was the practice that the City of Woodville had had and I don't think it's in the record, the records are on microfilm in the newspaper in the Town of Woodville and I think in 1973, they had four notices, notice four times in the paper, calling for elections for a Town Marshal. It was their practice but it's not required by state law for Town Marshal and for all the elective positions to be filled in the Town of Woodville. But it was just their City's practice, but there was no requirement by state law that they had to do that.

JUDGE JOLLY: Was it an announcement or a notice? Was it an announcement, elections will be held for the following offices, or do you know?

MR. RHODES: Your Honor, one of the co-counsel --

JUDGE BARBOUR: We've got another segment of this case dealing with the commissions. And under the state law, which now has been precleared, the commissioners in a town of under 20,000 people, which is the category in which Woodville would fit, now appoint City Election Commissioners rather than electing them. Why do you have any real complaint there?

MR. RHODES: Your Honor, if I could preface that argument by sort of halfway responding to Mr. Horn's argument that so many elections have happened since this has come, and now the state has given the City the authority to appoint Election Commissioners. And I guess there's no -- as far as asking what relief would be appropriate, the only relevant time period I guess would be 1985 to present because the elections were held every four years.

If they had held elections for Election Commissioners in 1985, those Election Commissioners probably would be serving now except if any vacancy had happened after January 1, 1987, then a vacancy for that position could

have been filled by appointment and nothing could be challenged about that. But the present Election Commissioners serving were appointed prior to that statute becoming effective.

And so the real question is for those Election Commissioners who were appointed in 1985 that should have been elected in 1985, what relief would be appropriate. And we would ask the Court that the appropriate relief would be to declare those positions not to be vacant, but to declare that appointment process to be in violation of Section 5 and to enter an injunction to prohibit them from doing anything until they have obtained preclearance of the appointment of those Election Commissioners in 1985.

JUDGE BARBOUR: Doesn't that have the practical effect of killing the elections which are upcoming for Mayor and Alderman because you wouldn't have an Election Commission to carry out those duties?

MR. RHODES: Yes, Your Honor. But Section 5 of the Voting Rights Act would require that. In Haden versus Martin, a Three-Judge Panel out of North Carolina held that if a voting change is not precleared, it is unenforceable as law. And although it might have the practical effect of killing the upcoming elections, it cannot be enforced because they have not obtained that preclearance.

JUDGE BARBOUR: At what stage will the Mayor and Board of Alderman of Woodville have the opportunity or the right to appoint those Election Commissioners?

MR. RHODES: When the terms of office of the Election Commissioners, who were appointed in 1985, expire and I guess they would take office with the new Mayor and Board of Aldermen sometime in July, I believe, June or July, that they would take office. And so in July they could appoint new Election Commissioners.

JUDGE BARBOUR: We're squabbling over a three-month period now.

MR. RHODES: Yes, Your Honor, because all the prior Election Commissioners, their terms have expired.

JUDGE BARBOUR: All right, sir.

MR. RHODES: Just the ones who were appointed in

1985. Thank you.

JUDGE JOLLY: Mr. Horn?

MR. HORN: May it please the Court?

About four months ago I spoke with counsel opposite and explained to them that the City of Woodville would be holding elections on May 2, 1989, for Town Marshal and if they wished to have anybody run for that position, all they needed to do was come down and qualify. And in our response filed in February to the motion for summary judgment, the Town of Woodville pointed out that the position was not abolished and if anyone wanted to become Town Marshal of the Town of Woodville, all they needed to do was to go down, pay $10, and run. Under state law, the citizens have until 30 days prior to May 2, 1989, to come in and qualify for the position of Town Marshal. If someone wants to come down and qualify, the City will hold that election.

Meanwhile, on February 28, 1989, the Town of Woodville submitted a request to the Justice Department to preclear the abolition of the position of Town Marshal, based on the fact that the position is withering, nobody's running for it. The Town is not seeking any kind of retroactive approval of abolition of the position, in the sense of not holding the election in May and waiting for the Justice Department to rule upon that.

The 60-day period with the Justice Department for ruling on the commission will run just prior to the election, but the Town is going to hold the election for the Town Marshal if someone qualifies and will keep going through the election process, unless and until the Justice Department agrees and approves the abolition of the position of Town Marshal.

The Town is going to hold that election and chose to hold that election. One reason had to do with the increased expense. The Town doesn't want to abolish the positions and then seek retroactive preclearance. If that happens in the case that preclearance does not occur, the Town will have to hold a special election and that would be costly and expensive.

So I'm announcing to counsel opposite right now, if

somebody wants to run for Town Marshal, go on down, pay their $10, and qualify.

In terms of Election Commissioner, the deposition testimony of the town clerk reflects the fact that bout 15 years ago nobody ran for Election Commissioner. The town has 1,500 people. The town had to do something. The town appointed an Election Commissioner. The town did not obtain preclearance from the Justice Department appointing these Election Commissioners. They just appointed folks to come in and run the elections.

And in response to Judge Barbour's question of Mr. Rhodes, the current Election Commissioners in Woodville really don't have a function, practically. If you look at the response of Woodville to the interrogatories submitted to us by the Plaintiffs, the Court will notice that there have only been Democratic primaries since 1964. There's no Republican primary. There are only Democratic primaries. You have a first primary and a second primary and the general election is just pro forma. Whoever wins the second Democratic primary is elected.

The Democratic Party, the Democratic Executive Committee, by state law, has the authority and obligation and duty to run these Democratic primaries. They're not a party to this case. So we've got Election Commissioners who are in Woodville, who basically have very little or nothing to do in terms of the election coming up.

So there's really no relief, even if somehow retroactively, the Court could go back and invalidate the appointment of the Election Commissioners in 1985. There's no relief there because there's not going to be a general election other than just a pro forma, here it is. That's the town's position.

Hopefully the Justice Department will preclear abolishing the position of Town Marshal. The submission was sent to the Justice Department February 28. The 60-day period will run some four to five days prior to the May 2 election.

Ms. McDonald for the Plaintiffs filed a vehement, sort

of vitriolic objection to preclearing the abolition of the position of Town Marshal, that's not in the record. So I don't know what the Justice Department will do with that. The town will hold the election of Town Marshal and continue to seek to try to abolish it. The position will be abolished. That's the town's position.

JUDGE JOLLY: Thank you very much.

MR. HORN: Yes, sir.

JUDGE JOLLY: Mr. Rose, have you got anything you would like to add?

MR. ROSE: Your Honor, I think what counsel have said that basically he's admitting that the City have not held the election for Town Marshal and after we filed this lawsuit, they now seek to attain preclearance. We have notified them and put them on notice several, at least about two years ago, that there was a problem. And he at one time indicated that they was going to probably try to move on that, which they never did that.

JUDGE JOLLY: The motion is moot.

MR. ROSE: I wouldn't think it's moot, Your Honor. When you look at the case of Penalty versus Hern, I believe it is -- when you're talking about the Kirksey case, one of the Kirksey cases, when we filed a lawsuit then we got the relief that we are now attempting. No effort was made towards that until after this lawsuit was filed. Once this lawsuit was filed now they're saying, of course through their counsel, that they are not willing to hold the election.

JUDGE JOLLY: What relief do you want now?

MR. ROSE: Well, for one thing we would like to -- we want to have the election for Town Marshal. If that is what they are saying --

JUDGE JOLLY: What if nobody runs?

MR. ROSE: Somebody will run. I guarantee you if the election is called within the next two weeks, we will have at least five -- some blacks will run like they have always run for this position until the City stopped having it. Blacks are willing to run, want to run, really.

JUDGE BARBOUR: Mr. Rhodes, you keep referring to if an election is called. Elections are called by state law and people who want to occupy those elected positions go

down and qualify. Usually there is enough interest so that somebody qualifies. In this instance, nobody has qualified. Is there any state law whatsoever that says that the City's got to round up a candidate? Is that basically what you are saying?

MR. ROSE: Only thing I was saying, Your Honor, is practice of the City basically to give public notice of election. And not only that but I'm saying, too, you got to look at this --

JUDGE BARBOUR: Your client can know what the state law is just as well as somebody else.

MR. ROSE: But our client can't --

JUDGE BARBOUR: Advise him to go down and qualify for Town Marshal and run for it, rather than bringing a lawsuit about it.

MR. ROSE: Well, Your Honor, it's like this. First of all, the City abolished this position completely. It did just like it said it was going to do in the resolution. They have not appointed anybody to the Town Marshal position, no more than the Chief of Police, which is combined with the Town Marshal position, which is exactly what they said. They have not allocated any money to that position. We have to assume they have not held the election. Now they're saying we'll have the election now. I guess that's what he's saying.

JUDGE LEE: Assuming that they fall through and, in fact, there will be an election assuming someone qualifies, what is the injury? What is the remedy that you now seek?

MR. ROSE: Well, one of the remedies would be attorneys' fees, first of all, for the reason that they did not make this change until after we filed this lawsuit.

Secondly, we got the case of Penalty versus Hern where we're talking about you can -- before -- once a lawsuit is filed saying I'll make this change now -- the lawsuit dismissed then --

JUDGE LEE: I understand your discussion, but what we're really talking about is what is the remedy that you're seeking? You're seeking attorney's fees. What else?

MR. ROSE: We want attorneys' fees. We want some

assurance that the City will, in fact, have election for the Town Marshal. All we got now is the word from counsel. That's the only thing.

JUDGE JOLLY: How long ago was it that he advised you?

MR. ROSE: He didn't advise me. I disagree with that. He has not advised me.

JUDGE JOLLY: Has he advised anybody in your office?

MR. ROSE: As far as I know he have not advised us, Your Honor. All I know is a lawsuit was filed. They filed an answer to the lawsuit. The lawsuit was filed several months ago. Back in May, I believe. Before May. I'm not sure quite when the lawsuit was filed. The lawsuit was filed quite some time ago. Rather than admitting that they had not held the Town Marshal elections, he attempted to oppose that position. He said that he denied it. And he didn't advise me of that. That's his saying. But he did not advise me of that.

Your Honor, as I stated, Ms. Donald can testify. If we wanted to call a witness, she would testify that she have reviewed the newspaper files in Woodville and in 1973 that they gave notice that they was holding a Town Marshal election. Since that time, 1977, nothing have been said about a Town Marshal position. And, Your Honor, I think we ought to look at this not in a vacuum. You got to look at this -- I think a total of the situation. You got to look at the fact that prior to the city passing this resolution, blacks was constantly running for town marshal. It's hard to believe that in 73 you had blacks running --

JUDGE JOLLY: We're not procluding you putting her on the witness stand. That's up to you. Whatever you want to do.

MR. ROSE: Yeah, we would like to put her on the witness stand, if we could, please.

Could we have a brief conference, Your Honor?

JUDGE JOLLY: Is there an objection?

MR. HORN: I don't understand what is being said.

JUDGE JOLLY: She said that there have been notices before for the Marshal's job and no notices now and that

this is evidence that you have deliberately and intentionally abolished the job and made a change.

MR. HORN: Your Honor, I have had no notice obviously before right now that these notices allegedly were made in the Woodville newspaper. Obviously Ms. McDonald has a right to testify if she's seen them. I would make best evidence objections if she doesn't have the notices with her so I could look at them.

JUDGE JOLLY: Put her on the stand. We'll see where we go.

DEBORAH McDONALD,
having first been duly sworn, was
examined and testified as follows:
DIRECT EXAMINATION

BY MR. ROSE:

Q. Would you state you name, please, ma'am?

A. Debra McDonald.

Q. Ms. McDonald, where do you live?

A. I live at Fayette, Mississippi, and I practice law in McComb, Mississippi.

Q. In your law practice, have you had the occasion to examine the records of the City of Woodville, seeking information pertaining to holding a Town Marshal election or Election Commission election?

A. Yes, I have.

Q. Would you tell the Court what you did, please?

A. Okay. On Tuesday of this week I traveled to Woodville to check the newspapers for any notices of elections. And the newspaper in Woodville, all the old newspapers are on microfilm, and it's no means of copying that microfilm. So what I did is I went through the 1977 -- I mean 1973 newspapers and I came upon a notice. The notice was entitled --

MR. HORN: Excuse me. For the record, I would object based on -- I think it's Rule 1006. If records are to be summarized and not produced and not to be introduced in toto at trial, then notice has to be given seasonably to counsel opposite so I could examine the records myself. This has not been done, so I object.

JUDGE JOLLY: Okay.

Q. You may proceed.

A. Okay. The notice stated a notice of a meeting or it may have said a notice of a mass meeting to determine the -- or to set -- to have a temporary --

MR. HORN: Also object as to hearsay, Your Honor.

A. Okay. To have a temporary appointment of Election Commissioners for purposes of setting the city elections. That basically was the gist of the note. The notice ran 3-7-73. Then it ran on the 14th. It ran on the 21st. And it ran on the 28th. And it ran in the legal notices section of the newspaper. And I looked at each notice and each notice was the same.

And I never determined what that, you know, what the effect of that was but I did continue to read in the newspaper and elections were held in -- well, the general election was held -- I mean, the primary election was held in May and general election was held in June.

Q. What about the year 1985? Did you notice anything then?

A. Okay. Now, in the year -- I continued to check -- I just did four years. 1977 I checked the newspapers and there was a notice, there was no notice in the legal section. There was an announcement on the front page of the newspaper concerning the elections in Centreville and elections in Woodville. The only elections that were mentioned on the front page of the paper for Woodville were elections for the Mayor and Board of Aldermen. There was no mention of any election for Election Commissioners or for a Town Marshal.

Q. That was in 1977 election?

A. Yes.

MR. ROSE: I tender the witness.

MR. HORN: Briefly, Your Honor.

CROSS-EXAMINATION

BY MR. HORN:

Q. Ms. McDonald, you've read the pleadings in this case, haven't you?

A. Yes, I have.

Q. And you're representing the Plaintiffs.

A. That's correct.

Q. And the memorandum opposition for Plaintiffs'

motion for summary judgment was served on you on February 6, 1989; is that correct?

A. That's correct.

Q. Do you remember reading this sentence in that memorandum? "If someone wishes to run for Town Marshal in Woodville in the upcoming May primary election , so be it?"

A. In the certificate of service?

Q. No, in the brief itself. Do you remember reading that?

A. I don't recall specifically ready it.

Q. Would you please look at Page 4 of that memorandum and see if I've read that sentence correctly up at the top of the page?

JUDGE JOLLY: I think this is getting beyond the cross-examination.

MR. HORN: Yes, sir. Your Honor, if I could ask one more question.

Q. Ms. McDonald, you have been on notice since February that Woodville's position is that anyone that wants to run for Town Marshal can qualify and run, haven't you?

A. No, I haven't.

JUDGE JOLLY: To the extent that that statement there tells you that, you've had that document there since then --

A. May I answer, Your Honor?

JUDGE JOLLY: You have had that document?

A. That's correct. But, I mean, to say that to the extent that someone wants to run, so be it, I mean, I don't know what that means necessarily.

JUDGE JOLLY: All right.

Q. In the Defendants' response to motion for summary judgment also filed February 6, 1989, and served upon you, didn't I also say in the formal response entered in the Court records that if someone wanted to run for Town Marshal they could qualify and run?

A. I just don't remember. I mean, I don't remember us having any discussions on it or, you know.

Q. Look at Paragraph 3 of Defendants' response to motion for summary judgment served upon you

February 6, 1989. It's filed of record here. And didn't the Town of Woodville, through me, say if someone wishes to run for the position of Town Marshal they could run?

MR. ROSE: Your Honor, could I inquire? Is this your memorandum you're referring to or is that a motion?

MR. HORN: Your Honor, it's a response to Plaintiffs' motion for summary judgment.

MR. ROSE: Is this the memorandum? That's all I want to know. Or is this a motion?

MR. HORN: It's a response to the motion.

MR. ROSE: Your Honor, we object to this matter -- argument just asking her --

JUDGE JOLLY: Okay. That's enough. You're going beyond the scope of direct examination impermissibly so.

MR. HORN: Yes sir. I understand. I have nothing further, Your Honor.

JUDGE JOLLY: You may step down.

MR. ROSE: Well, Your Honor, I would like to also just briefly mention something with reference to the Election Commission. One thing that I would like for the Court to note is that I believe that we brought an issue whether or not the City has received Section 5 preclearance for now appointing the Election Commission as far as they cited the Mississippi Code as authority.

One of the things that I was requesting I wanted them to produce, I asked the Justice Department specifically I asked them and I got a response back in December of this past year, 1988. I asked if anybody from the City of Woodville or State of Mississippi requested preclearance for this particular change, requesting the method of changing the Election Commission to appointed position. That answer was no. And it was in a deposition. Their answer was no.

So as far as I'm concerned, it's our contention that the burden was on them to show that they have -- that this have been approved. The written deposition says it has not. The only thing they've done, they've presented a code which I think is secondary evidence, reciting the fact that this code section states something about that the Attorney General had approved this, but we don't really know specifically what was stated in there. As a

matter of fact, the Justice Department --

JUDGE JOLLY: I thought they attached a letter to some of their motions for summary judgment and the Attorney General of the United States Department of Justice had written to Attorney General Pittman.

MR. ROSE: They did attach a letter that stated reference to so-and-so and so-and-so and particular bill and basically that's what it just stated the reference to that. But we don't really know if the Attorney General really reviewed this whole thing. So clearly the Attorney General must have had some problems for him to deny that they had precleared. You see what I'm saying?

So that was -- I don't know. I think the burden would have been upon them to at least show what the Mississippi Attorney General submitted, asking if they explained this. That, I don't believe they've done as shown.

Thank you, Your Honor.

JUDGE JOLLY: Thank you very much. And we will adjourn for somewhere between 15 and 30 minutes and we will reconvene at that time.

(Recess.)

****

CERTIFICATE

I, Celeste O. McClelland, Registered Professional Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 35 pages contain a full, true, and correct transcript of the proceedings had in the aforenamed case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 28th day of June, 1989.

Celeste O. McClelland

Celeste O. McClelland

My Commission Expires:

June 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, ET AL.

Plaintiffs

V.

NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI, ET AL.

Defendants

Civil Action No. W85-0029(B)

ANSWERS TO DEPOSITION UPON WRITTEN INTERROGATORIES TO HONORABLE WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

City of Washington)
District of Columbia)

Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, United States Department of Justice, being duly sworn, deposes and answers:

1. State you name and address.

ANSWER:

Wm. Bradford Reynolds, Department of Justice, Civil Rights Division, 10th & Constitution Ave., N. W., Washington, D. C. 20530.

2. State your present position.

ANSWER:

Assistant Attorney General, Civil Rights Division, United States Department of Justice.

3. State your duties and responsibilities with regards to submission of changes in voting qualifications or prerequisites to voting, or standards, practices, or

procedures with respect to voting, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973(c).

ANSWER:

My duties and responsibilities with respect to submissions under Section 5 of the Voting Rights Act are essentially those of the Attorney General, who has the responsibility to review voting changes submitted by covered jurisdictions pursuant to Section 5. Review is undertaken to assure that the voting changes that are enacted or administered by the covered jurisdictions do not have the purpose or effect of denying or abridging the right to vote on account of race, color, or language minority status.

4. Ha[s] the United States' Attorney General delegated to you or to the Assistant Attorney General, in charge of the Civil Rights Act of 1965 [sic], his responsibility for approving submission[s] pursuant to SEction 5 of the Voting Rights Act of 1965?

ANSWER:

The Attorney General has delegated to the Assistant Attorney General, Civil Rights Division, his responsibilities for the administration of Section 5 of the Voting Rights Act of 1965 [see 28 C.F.R. §0.51.3]. I hold the position of Assistant Attorney General, Civil Rights Division, United States Department of Justice.

5. As Assistant Attorney General in charge of the Civil Rights Division of the United States Department of Justice, do you have custody and control of the records of the Civil Rights Division with respect to submission[s] pursuant to Section 5 of the Voting Rights Act of 1965?

ANSWER:

As the Assistant Attorney General, I have the ultimate control of the records of the Civil Rights Division with regard to all matters of the Division, including Section 5 submissions. The daily routine, however, including custody and control of records, pertaining to enforcement under the Voting Rights Act is exercised by the personnel of the Voting Section of the Civil Rights Division.

6. Based on your own personal knowledge and the

records of the Civil Rights Division kept in the ordinary course of business, please state if the [C]ity of Woodville, Mississippi, the [S]tate of Mississippi, or anyone or any entity acting in their behalf, has at anytime requested Section 5 preclearance from your office to change the [C]ity of Woodville, Mississippi's method of selecting its town marshall position by popular votes to a system where the marshall will be appointed by the mayor and board of aldermen. If yes, please state the date the submission was made and the final outcome of the submission. In the event the submission was approved, please state the date it was approved. If the submission was denied, please state the reason it was denied.

ANSWER:

The Department of Justice, Civil Rights Division, maintains records of submissions made pursuant to Section 5 of the Voting Rights Act, which describe the type and status of submissions. These records do not reflect that we have received a submission pursuant to Section 5 concerning a change in the City of Woodville's method of selecting its town marshall from an elective to an appointive system, where the town marshall will be appointed by the mayor and board of aldermen.

7. Based upon your own personal knowledge and the records of the Civil Rights Division kept in the ordinary course of business, please state if the [C]ity of Woodville, Mississippi, the [S]tate of Mississippi, or anyone or any entity, acting in their behalf has at anytime requested Section 5 preclearance to change the [C]ity of Woodville, Mississippi's method of selecting municipal election commissioners from elected positions to appointed positions. If yes, please state the date the submission was made, and the final outcome of the submission. If the submission was approved, please state the date of approval. If denied, please state the date of its denial and reason(s) for the denial.

ANSWER:

A review of our Section 5 records does not reflect that we have received a submission pursuant to Section 5 concerning a change in the City of Woodville, Mississippi's method of selecting municipal election

commissioners from elected positions to appointed positions.

8. In reference to question numbers 6 and 7, please state if your office has approved any legislative act(s) by the state of Mississippi, which changed the form of selecting town marshall and municipal election commissioners from elected positions to appointed positions. In your answer, please list the particular act(s) or statute(s) and the date the submission was approved. If a submission was made, but denied, please state the reason(s) for the denial(s) and date(s) of denial.

ANSWER:

A review of our Section 5 records does not reflect that we have received a submission pursuant to Section 5 of a legislative act or acts by the State of Mississippi which changed the form of selecting a town marshall and municipal election commissioners from elected positions to appointed positions.

9. On April 11, 1977, the Mississippi Legislature enacted Senate Bill 3199 [sic] (Exhibit A attached to these depositions), which authorizes the [C]ity of Woodville, Mississippi, to appoint its town marshall. Please state if your records indicate if a Section 5 submission was made. If yes, please state if it was approved. If denied, please state the reason(s) for the denial and the date it was denied.

ANSWER:

A review of our Section 5 records does not reflect that we have received a submission pursuant to Section 5 of Senate Bill 3139 or any other voting change involving the City of Woodville's appointment of its town marshall.

10. Please state if the [C]ity of Woodville, Mississippi, or any person or entity in its behalf has made a Section 5 submission seeking to obtain preclearance for the enclosed city resolution, which is annexed hereto as Exhibit B, which changes the city's town marshall position from an elected position to an appointed one. If yes, please state if the submission was approved and the date of approval. If denied, please state the date it was denied and the reason(s) for the denial.

ANSWER:

A review of our Section 5 records does not reflect that we have received a submission pursuant to Section 5 of the referenced resolution regarding a change in the City of Woodville's method of selecting the town marshall position from an elected position to an appointed one.

W. Bradford Reynolds
WM. BRADFORD REYNOLDS

Subscribed and sworned before
me this 6th day of November, 1988.

SIGNED BY
NOTARY PUBLIC
My commission expires
MY COMMISSION EXPIRES
APRIL 14, 1992

RESOLUTION

WHEREAS, the original Charter of the Town of Woodville provided that the Mayor and Board of Aldermen were vested with the power and authority, in their discretion, to appoint a Marshal and such other subordinate officers as may be established by the Mayor and Aldermen; and

WHEREAS, on February 22, 1890, the Legislature of the State of Mississippi did amend the Charter of the Town of Woodville as follow, to-wit:

"SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That section three of an act entitled an act to amend and reduce into one act the acts incorporating, the Town of Woodville, and the several acts amendatory thereto, approved March 5, 1878, be and is hereby so amended as to require that the Marshal of said Town shall be elected hereafter by the qualified electors of said Town.

SECTION 2. THIS ACT SHALL TAKE EFFECT ON ITS PASSAGE. Approved February 22, 1890." and

WHEREAS, the Mayor and Board of Aldermen have deemed that it is to the best interest and welfare of the Town of Woodville that the Mayor and Board of Aldermen be vested with the power and authority to appoint the Marshal and, in their discretion, to appoint the same person to the office of Marshal and Chief of Police; and whereas, it is necessary that the Legislature of the State of Mississippi repeal the amendment hereinabove set forth to permit such appointment;

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Board of Aldermen of the Town of Woodville in Regular Session assembled on this 7th day of February, 1977, that the Legislature of the State of Mississippi be requested to pass appropriate legislation repealing the aforesaid amendment to the Charter of the Town of Woodville dated February 22, 1890, thereby permitting said Mayor and Board of Aldermen to appoint the Marshal for the Town of Woodville.

BE IT FURTHER RESOLVED that for good cause

shown, this Resolution shall be operative and take effect from and after its passage.

The above and foregoing Resolution was reduced to writing, introduced by Alderman D'Quilla, and was read and considered and voted upon at the Regular Meeting of the Mayor and Board of Aldermen of the Town of Woodville on the 7th day of February, 1977, and upon motion of R. J. Senko, duly seconded by H. B. Curry, it was moved that the same be adopted on final "yea" and "Nay" vote which was taken as follows:

The following members of the Board of Alderman of the Town of Woodville voted "Yea" as to the final passage of said Resolution:

Herbert H. Curry
Gary D'Aquila
Anthony Flaccomio
R. J. Senko

The following members voted "Nay" as to the final passage of said Resolution:

None

Whereupon, the above Resolution was declared adopted, this the 7th day of February, A. D., 1977.

APPROVED:
/s/ G. J. Gonda
Mayor

ATTEST:
/S/ Frances Townsend
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, ET AL

PLAINTIFFS

VS.

NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI
ET AL

DEFENDANTS

ANSWER

COME NOW the Defendants herein, and in Answer to the Complaint filed in this action would show the following:

FIRST DEFENSE

1.

The Complaint fails to state a calim upon which relief can be granted.

SECOND DEFENSE

2.

Plaintiffs' claims are barred by laches.

THIRD DEFENSE

3.

The Complaint fails to join as Defendants the indispensable parties: the Woodville Democratic and Republican Executive Committees, and the members thereof and the Woodville Election Commission, and the members thereof.

4.

Paragraph I of the Complaint contains legal conclusions and therefore is denied.

5.

The allegations of paragraph II of the Complaint are denied.

6.

The allegations of paragraph III of the Complaint are denied.

7.

The allegations of paragraph IV of the Complaint are admitted.

8.

Paragraph V contains legal conclusions and therefore is denied.

9.

It is admitted that Woodville, Mississippi, is a municipality chartered under the laws of the State of Mississippi, that Ron Senko is Mayor of that City and that the Board of Aldermen and the City Clerk are Defendants in this action. The remaining allegaions of paragraph VI are denied.

10.

Paragraph VII of the Complaint contains legal conclusions and therefore is denied.

11.

It is admitted that in 1965, the Town of Woodville elected its Town Marshall by popular vote, and that after the death of the Town Marshall in 1977, no other Town Marshal has ever been elected or appointed because the position of Town Marshall has remained vacant. The remaining allegations of paragraph VIII are denied.

12.

The allegations of paragraph IX are denied.

13.

The allegations of paragraph X are denied.

14.

The paragraph entitled "Cause of Action" is denied.

15.

It is denied that Plaintiffs are entitled to any relief whatsoever. Any and other remaining allegations of the Complaint are denied, and Defendants pray tha this action be dismissed at Plaintiffs' costs.

Respectfully submitted,
/s/Dennis L. Horn
DENNIS L. HORN

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, Dennis L. Horn, hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Answer to Hon. Willie L. Rose and Hon. Deborah McDonald, Southwest Mississippi Legal Services, P. O. Box 1342, McComb, MS 39648 and Hon. Carroll Rhodes, P. O. Box 588, Hazlehurst, MS 39083.

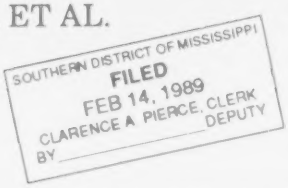
This the 13th day of May, 1988.

/s/Dennis L. Horn
DENNIS L. HORN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, ET AL.

PLAINTIFFS



VS.

NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI, ET AL.

DEFENDANTS

RESPONSE IN OPPOSITION TO MOTION
FOR PARTIAL STAY OF PROCEEDINGS

Comes now, plaintiffs in response to defendants' motion for a partial stay of proceedings to allow defendants, City of Woodville, et al, an opportunity to seek preclearance pursuant to Section 5 of the Voting Rights Act of 1965 and plaintiffs would respond as follows:

1. That defendants have had more than ten (10) years to seek preclearance.

2. That to allow preclearance at this stage of proceedings would circumvent the requirements of Section 5 of the Voting Rights Act.

3. That defendants cite no authority nor can they show any legitimate reason for such a stay.

WHEREFORE, PREMISES CONSIDERED, plaintiffs respectfully request that defendants' motion for a partial stay of proceedings be denied and cost and attorney fees be assessed against defendants.

Respectfully submitted,
Willie L. Rose
WILLIE L. ROSE
6675 OLD CANTON ROAD
APT. 1144

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Willie L. Rose, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing response in opposition to motion for a partial stay of proceedings to the following attorneys for defendants:

Honorable Dennis Horn
P. O. Box 1725
Jackson, MS 39215-1725

Honorable Richard T. Watson
P. O. Box 637
Woodville, MS 39669

This, the 14th date of February, 1989.

Willie L. Rose
WILLIE L. ROSE

EXHIBIT I

11. Please state the names of each person who has run for a city office in each city election since 1965. In your answer please identify the race of each person, the amount of votes he received, and the date of the election which the person ran for office.

11. RESPONSE: (a) Primary Election - May 13, 1969

Names	City Office	Votes	Race
Marvin N. Lewis	Mayor	382	W
Earnest Woodside	Mayor	309	B
J. M. (Mac) Best	Alderman	387	W
Alfred Broadway	Alderman	281	B
Thomas M. Bryan	Alderman	371	W
Cage Chisholm	Alderman	381	W
Jimmy S. Harris, Sr.	Alderman	273	B
James (Jabbo) Herrington	Alderman	374	W
John J. Monroe	Alderman	278	B
Charlie Reed	Alderman	279	B
Joseph Lee Dixon	Marshall	291	B
T. O. Sessions	Marshall	401	W

Democratic Committee (Demo. Comm)

Mrs. Celeste Boyd	Demo. Comm.	262	B
Mrs. Celeste Cane	Demo. Comm.	255	B
Leon Chambers	Demo. Comm.	259	B
Ned Jackson	Demo. Comm.	256	B
Billy Joe Jones	Demo. Comm.	384	W
Joe C. Leake	Demo. Comm.	379	W
M. H. (Mac) McGehee	Demo. Comm.	375	W
Charles A. Plitt	Demo. Comm.	391	W
Rufus Scott	Demo. Comm.	254	B
Adolph W. Treppewdahl	Demo. Comm.	387	W
James E. Wilkinson, Jr.	Demo. Comm.	611	W

(b) General Election - June 3, 1969

Johnny Lee Chambers	Mayor	261	B
Marvin N. Lewis	Mayor	433	W
J. M. (Mac) Best	Alderman	647	W
Thomas M. Bryan	Alderman	630	W
Cage Chisholm	Alderman	439	W
Hubert B. Curry	Alderman	633	W
Joseph Woodside	Alderman	262	B
Fred McCarstle	Marshall	454	W
Leon Prater, Jr.	Marshall	244	B

(c) Primary Election - May 8, 1973

Robert F. Catchings	Mayor	163	W
Charles E. Johnson	Mayor	241	B
Marvin N. Lewis	Mayor	213	W
Joe M. Best	Alderman	133	W
Tom Bryan	Alderman	151	W
Mrs. Celeste Cane	Alderman	166	W
Hubert B. Curry	Alderman	259	W
Gary D'Aguilla	Alderman	288	W
Anthony (Tony) Flaccomio	Alderman	293	W
Jimmie Simpson Harris, Sr.	Alderman	155	B
John J. Monroe	Alderman	171	B
Louis M. Netterville	Alderman	91	W
Charlie Reed	Alderman	166	B
Ron Senko	Alderman	262	W
Fred C. McCarstle	Marshall	410	W
Tom Russ	Marshall	168	B
Williard M. Ferguson	Demo. Comm.	475	W
Richard Flaccomio, Jr.			

	Demo. Comm.	476	W
Elizabeth J. Hopson	Demo. Comm.	425	W
Larry J. Johnson	Demo. Comm.	183	B
Joe C. Leake	Demo. Comm.	442	W
Mary M. McGehee	Demo. Comm.	504	W
Isabella Scott	Demo. Comm.	186	B
Adolph W. Treppendahl	Demo. Comm.	430	W

(d) General Election - June 5, 1973

Marvin N. Lewis	Mayor	268	W
George J. Gonda	Mayor	334	W
Hubert B. Curry	Alderman	427	W
Gary D'Aquilla	Alderman	427	W
Anthony (Tony) Flaccomio	Alderman	427	W
Ronald J. Senko	Alderman	426	W
Fred McCarstle	Marshal	452	W

(e) Primary Election - May 10, 1977

George J. Gonda	Mayor	344	W
Marvin N. Lewis	Mayor	217	W
Hubert B. Curry	Alderman	320	W
Gary D'Aquilla	Alderman	479	W
Anthony (Tony) Flaccomio	Alderman	319	W
Charles James	Alderman	281	B
Larry J. Johnson	Alderman	223	B
Ron Senko	Alderman	456	W

(f) Primary Election - May 12, 1981

George J. Gonda	Mayor	298	W
Larry J. Johnson	Mayor	256	B
Gary D'Aquilla	Alderman	328	W

Charles James	Alderman	287	B
Andy J. Lewis	Alderman	304	W
Mac McGehee	Alderman	206	W
Betty Morgan	Alderman	213	W
Ron Senko	Alderman	363	W
Consandra "San" Stewart	Alderman	260	W
Charles E. Whatstone, Jr.	Alderman	150	W

(g) General Election - June 2, 1981

George J. Gonda	Mayor	unknown	W
Gary D'Aquilla	Alderman	unknown	W
Charles James	Alderman	unknown	B
Andy J. Lewis	Alderman	unknown	W
Ron Senko	Alderman	unknown	W

(h) Primary Election - May 14, 1985

Larry J. Johnson	Mayor	304	B
Ron Senko	Mayor	355	W
Gary D'Aquilla	Alderman	420	W
Anthony Flaccomio	Alderman	275	W
Charles James	Alderman	405	B
Andy J. Lewis	Alderman	401	W
Betty R. Morgan	Alderman	233	W
Tim Sessions	Alderman	424	W
William A. Ward	Alderman	281	B

(i) General Election - June 4, 1985

Ron Senko	Mayor	unknown	W
Gary D'Aquilla	Alderman	unknown	W
Charles James	Alderman	unknown	B
Andy J. Lewis	Alderman	unknown	W
Tim Sessions	Alderman	unknown	W

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, ET AL

PLAINTIFFS

VS.

NO. W88-0029(B)

CITY OF WOODVILLE, MISSISSIPPI,
ET AL

DEFENDANTS

DEFENDANTS' RESPONSE TO PLAINTIFFS'
FIRST SET OF INTERROGATORIES TO
DEFENDANTS

COME NOW the Defendants herein, and file this their Responses to Plaintiffs' First Set of Interrogatories to Defendants, as follows:

1. Please state if the City of Woodville, the State of Mississippi or any of its agencies or subdivisions, at anytime ever obtained preclearance under the provisions of Section 5 of the Voting Rights Act of 1965, as amended, to change its town marshall position from an elected position to any appointed position.

A. If yes, please state the method by which the preclearance was obtained, and the date it was obtained.

B. If no, please state the authority the city relied upon for its authorization to make the change.

RESPONSE: No preclearance was obtained. A copy of Chapter 931, Local and Private Laws of the State of Mississippi making the appointment of a twon marshall discretionary is attached.

2. If the city requested preclearance and it was denied, plese state the date the request was made and to whom it was made.

RESPONSE: Not applicable.

3. Is the city contending that its chief of police position is a different position from its town marshall position? If yes, please state how the two positions differ. In your answer, please state the duties and responsibilities of each position.

RESPONSE: Yes. The town marshall position is created by Woodville's special charter. The town marshall is the chief law enforcement officer in Woodville. The chief of police position was created by vote of the Board of Aldermen. The chief of police possesses authority basically coterminous with that of the town marshall.

4. If the defendants are contending that its town marshall position is different from its chief of police position, please state if both positions have at anytime been occupied at the same time. In your answer, please identify the person(s) serving as town marshall and the person(s) serving as chief of police, the date(s) the two positions were occupied simultaneously, the salary of each officeholder, and their term of office.

RESPONSE: No.

5. Please state if the city has at anytime since 1977 announced to the public that it was holding election(s) for its town marshall position. If yes, please state the date each announcement was made and the manner in which each announcement was made. If no, please state why no announcement was made.

RESPONSE: No. There has been no town marshall election.

6. Please list all announcements the city has made announcing the election of its city's election commissioners. In your answer, please state the date and manner in which each announcement was made. If no announcements were made, please state your reason for announcing the elections.

RESPONSE: Woodville follows applicable Mississippi law in conducting its elections. No notice has been required for general and primary elections. Notice may have been required for special elections. Announcements are made in accordance with the law. Any

announcements so made would appear in back issues of the Woodville Republican Newspaper. Access to that newspaper is equally available to the Plaintiffs.

7. Is it the normal practice of the city to announce the date of the electing of its aldermen and mayor elections?

RESPONSE: See No. 6.

Respectfully submitted,
Dennis L. Horn
DENNIS L. HORN

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, Dennis L. Horn, hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Defendant's Responses to Plaintiffs' First Set of Interrogatories to Defendants to Hon. Willie L. Rose and Hon. Deborah McDonald, Southwest Mississippi Legal Services, P. O. Box 1342, McComb, MS 39648 and Hon. Carroll Rhodes, P. O. Box 588, Hazlehurst, MS 39083.

This the 14th day of October, 1988.

Dennis L. Horn
DENNIS L. HORN

FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-301

In The

Supreme Court of the United States

October Term, 1989

JOHN MONROE, ET AL.

Appellants,

v.

CITY OF WOODVILLE, MISSISSIPPI, ET AL.

Appellees.

On Appeal From a Three-Judge District Court
For The Southern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

DENNIS L. HORN
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(601) 373-0170
Counsel for Appellees

September 21, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a three-judge court's finding that there had been no change affecting voting pursuant to § 5 of the Voting Rights Act where no candidate had come forward to qualify for the $50.00 per month town marshall position presents a substantial federal question, especially when any question has been mooted by the town's now having formally abolished that position by preclearance through the United States Justice Department.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were the appellants John Monroe, Jimmy Harris, John Green and all others similarly situated and the appellees City of Woodville, Mississippi, Ron Senko, in his capacity as Mayor, and Charles James, Gary D'Quilla, Tim Sessions, as members of Woodville, Mississippi Board of Aldermen, Joe Townsend, Mary Magee, and Herbert Curry, as members of the City Election Commission and Frances Townsend as City Clerk.

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No. 89-301

In The

Supreme Court of the United States

October Term, 1989

JOHN MONROE, ET AL.

Appellants,

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CITY OF WOODVILLE, MISSISSIPPI, ET AL.

Appellees.

On Appeal From a Three-Judge District Court
For The Southern District Of Mississippi

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss and/or affirm on the grounds that the question presented on appeal is so insubstantial as not to need further argument. Additionally, this action is rendered moot following preclearance under § 5 of the Voting Rights Act of 1964, 42 U.S.C. § 1973c.

STATUTORY PROVISION INVOLVED

In pertinent part, 42 U.S.C. § 1973c provides that a covered jurisdiction must seek a declaratory judgment

action in the United States District Court for the District of Columbia or a preclearance by the office of the United States Attorney General whenever it "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972 . . . "

STATEMENT

The Town of Woodville neither enacted nor sought to administer a procedure with respect to voting, and, hence, made no change subject to § 5.

The abolition of the defunct municipal office has been precleared by the United States Justice Department.

ARGUMENT

This § 5 Voting Rights Case Presents An Insubstantial Federal Question, Which Question Has Been Mooted By Preclearance.

The Town of Woodville has a population of 1,512 persons. The old town marshall's position, paying only $50.00 per month, had powers virtually coextensive with those of the chief of police whose position has been continually occupied since 1968. By the record on this appeal, there has been no candidate who has attempted to run for the position of town marshall from at least 1977

until the present. After 1977, that position simply withered for lack of interest.

This case is best summarized by the statement of Judge Barbour to counsel for the Plaintiffs/Appellants herein.

> Judge Barbour: Mr. Rhodes, you keep referring to if an election is called. Elections are called by state law and people who want to occupy those elected positions go down and qualify. Usually there is enough interest so that somebody qualifies. In this instance, nobody has qualified. Is there any state law whatsoever that says that the city's got to round up a candidate? Is that basically what you're saying?

Transcript of proceedings, E-16 and E-17, Jurisdictional Statement.

When this litigation began the Appellants sought injunctive relief to ban the implementation of appointed election commissioners and an appointed town marshall in the Town of Woodville, Mississippi.[1] Both issues are now moot. The abolition of both elective officers has been precleared, and the appellants herein so concede. Jurisdictional Statement, p.7, n.14.

Specifically, the precleared Mississippi Election Code provides, effective January 1, 1987, that the election commissioners are to be appointed. Section 23-15-221 Mississippi Code Annotated (Supp. 1986). (See Editor's note

---

[1] By their questions presented in their jurisdictional statement, Appellants appear to challenge the failure to call special elections when and after no one qualified to run for town marshall. This issue was never raised in the pleadings or briefs below. The pleadings have never been amended, and this issue cannot be properly before the Court.

preceding Section 23-15-1 of the Mississippi Code, concerning the United States Attorney General's interposition of no objection to the amendment of former Section 23-11-13.) The formal abolition of the town marshall position for the town of Woodville was also subsequently precleared by the United States Justice Department. (Appendix "A"). It is not the case that Woodville had effectuated its 1977 resolution concerning the town marshall. As the three-judge court properly found, Woodville made no change subject to § 5. The town had made only its own resolution to seek an amendment to the State statute effective from and after passage. The authorization from the State legislature to allow appointment of the town marshall was never adopted by an ordinance of the town of Woodville, Mississippi.

In the Jurisdictional Statement here presented, the Appellants for the first time seek to establish some kind of declaratory judgment that previous practices of the Town of Woodville were in violation of § 5 of the Voting Rights Act. The Appellants are alleging that some special elections should have been held. There is no justiciable controversy, however, in having this Court declare what should or might have been by way of prior practice. This Court does not sit to declare history, but to enforce § 5 which can afford no relief in these circumstances. This Court cannot declare to be unenforceable previous election procedures which are already abolished, as approved and precleared under § 5.

Further, Governmental action occurs, by definition, whenever a covered jurisdiction shall "enact or seek to administer" a procedure with respect to voting. *Hathorn v. Lovorn*, 457 U.S. 255 (1982) (applying and interpreting

the language of 42 U.S.C. § 1973c). Only if a change in election procedures is made effective without preclearance is such change "unenforceable." *Id.*, at 269. Here, the Town did not enact or seek to administer a failure of candidates to come forward to fill moribund positions.

Appellent's reliance on two cases, *McCain v. Lybrand*, 465 U.S. 236 (1984) and *State ex rel. Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (Miss. 1908), is misplaced. *McCain v. Lybrand* held that a § 5 action was not moot when previously enacted provisions of a state law were submitted to the Justice Department as part of a package for approval or preclearance of later enacted sections of that same law. The portions of that case which were not moot had to do with the live controversy remaining as to preclearance for the previously unsubmitted portions of the statute.

In trying to show some remaining controversy, Appellants then say that the City of Woodville should have had special elections, and cite in support of that notion a 1908 Mississippi Supreme Court case, *State ex rel Doolittle v. Hays, supra.* That case properly held only that a public office had not become vacant under definitions then enacted under the Mississippi Election Law. The election law referred to by statute in that 1908 decision has been recodified and/or amended at least three times since that date and is currently in a form precleared by the United States Justice Department in 1987, again rendering any reference to such a statute moot.

This Court has recognized that preclearance moots a § 5 claim. *Berry v. Doles*, 438 U.S. 190, 193 (1978),[2] and, *see*,

---

[2] "If [§ 5] approval is obtained, the matter will be at an end." *Id.*

McDaniel v. Sanchez, 448 U.S. 1318, 1322 (1980). There has never been a suggestion from this or any other Court that a declaratory judgment action would lie over purported historic § 5 inaccuracies. There exists no case or controversy over such hypothetical matters. The Fifth Circuit has previously addressed an effort to exercise such historical jurisdiction and has rejected that effort, *White v. City of Belzoni, Miss.*, 854 F.2d 75 (5th Cir. 1988). The Fifth Circuit found that the plaintiffs in that action sought "something akin to a declaratory judgment," and the Fifth the Circuit held that action moot. *Id.*, at 76.

The record in this case shows only that no one served or attempted to serve as town marshall in the City of Woodville from at least 1977 through the present. There had been no voting change effectuated by the Town of Woodville. The Appellants cannot show a live stake in this controversy by way of proving that any one, either identified with the Plaintiff class or otherwise, had made application to be a candidate or to serve in the town marshall position. The town marshall position was abolished with no objection from the United States Attorney General. There is, simply, no case or controversy presented here.

CONCLUSION

There is no substantial federal question on this appeal. Any question has been mooted by § 5 pre-clearance. The appeal should therefore be dismissed and the decision of the three-judge court affirmed.

Respectfully submitted,

DENNIS L. HORN

APPENDIX

U.S. Department of Justice

Civil Rights Division

JPT:MAP:ZIF:gmh
DJ 166-012-3
Y3471
Y5306

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

May 2, 1989

Dennis L. Horn, Esq.
Horn & Payne
P. O. Box 1725
Jackson, Mississippi 39215-1725

Dear Mr. Horn:

This refers to Chapter 932, S.B. No. 3145 (1977), which permits a change from an elected to an appointed town marshall, and the February 7, 1989, Resolution which adopts that change for the Town of Woodville in Wilkinson County, Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on March 3, 1989; supplemental information was received on March 8, 31, and April 27, 1989.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an

objection comes to his attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

By: Illegible
for Barry H. Weinberg
Acting Chief, Voting Section

cc: Ms. Deborah A. McDonald
Southwest Mississippi Legal
Services Corporation

FILED
OCT 2 1989
JOSEPH F. SPANIOL, JR
CLERK

NO. 89-301

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

JOHN MONROE, ET AL

APPELLANTS

V.

CITY OF WOODVILLE
MISSISSIPPI, ET AL

APPELLEES

ON APPEAL FROM A THREE-JUDGE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Willie L. Rose
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(601)957-1935

October 2, 1989

QUESTIONS RAISED BY APPELLEES

1. Did the fact that no candidate qualified for a regularly scheduled town marshall election between 1977 and 1989 relieve the Town of Woodville, Mississippi of its obligation to seek Section 5 review of its failure to hold special elections for the vacant position?

2. Is a voting rights action moot when more than 8 months after the action is filed, a covered jurisdiction seeks and obtains preclearance of the challenged voting change while a claim for an award of attorney fees is still pending?

ARGUMENT I

THIS § 5 VOTING RIGHTS CASE PRESENTS A SUBSTANTIAL QUESTION.

Appellees argue, in their Motion to Dismiss or Affirm, that a substantial question is not presented for review because: (1) there was a lack of interest in the town marshall position by the voters and (2) the position paid only $50.00 per month. (Motion to Dismiss or Affirm, pp. 2-3). That argument is specious. Three black voters filed the Section 5 action on March 8, 1988 because the town had abolished elections for the marshall position in 1977. (Juris. Stat. pp. 3-4). They did not qualify to run in regularly scheduled elections[1] not because of a lack of interest but because elections for the position had been abolished.[2] (Juris. Stat., App. E-16 through E-11).

Appellees state that appellants are raising the failure to call special elections for town marshall for the first time in their Jurisdictional Statement. (Motion to

[1]Appellees cite District Judge Barbour's exchange with appellants' attorney Willie Rose (sic) wherein the Judge said, "[I]n this instance nobody had qualified" for the position. (Motion to Dismiss or Affirm, p. 3) to support their contention that there was a lack of interest in *all* town marshall elections. However, a careful reading of the colloquy reveals that Judge Barbour was referring to regularly scheduled elections held every four years. (Juris. Stat., App. E-16 through E-18, and E-8 through E-12). Regularly scheduled elections are held during the same time period every four years. As Judge Barbour noted, a voter interested in a position would know when to qualify for the position when election time nears, provided the position has not been abolished.

On the other hand, a voter would not know when special elections to fill vacancies are held without the city governing authority calling the special election. Section 23-15-857, Miss. Code Ann. (Supp. 1988); (Juris. Stat., App. E-8 through E-12). The town's governing authority was required by state law and past practices to call a special election to fill the vacant town marshall position. (Juris. Stat., App. E-8 through E-12); *State ex rel Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (Miss. 1908); Section 23-15-857, Miss. Code Ann. (Supp. 1988) Appellants argue this failure to call special elections is a voting change.

[2]Elections for the position were abolished in 1977. (Juris. Stat. 3-4)

Dismiss or Affirm, pp. 3-4) That is not true. Appellants raised this issue in their complaint, supplemental brief, and in oral argument. See (Juris. Stat., App. E-8 through E-12). More importantly, the court below considered appellants' argument on this point and summarily rejected them. (Juris. Stat., App. E-8 through E-12). Therefore, the questions presented for review by appellants are properly before the court.

Appellees also argue, without citing authority, that a substantial question is not presented in this appeal because the town marshall position pays only $50.00 per month. However, in *Hathorn v. Lovorn,* this court considered Section 5 issues involving school district trustees in Mississippi. *Hathorn v. Lovorn*, 457 U.S. (1982). School district trustees are not paid a salary, but given a per diem allowance and reimbursed for expenses and mileage. Section 37-6-13, Miss. Code Ann. (Supp. 1988); Section 37-7-235, Miss. Code Ann. (1972), repealed by Laws, 1986, Ch. 492, Section 45; Section 37-5-21, Miss. Code Ann. (1972), repealed by Laws, 1986, Ch. 492, § 44.

Next, appellees argue that Section 5 is implicated only by affirmative governmental action. (Motion to Dismiss or Affirm, pp. 4-5). However, Section 5 is not so limited. If a political subdivision is required to act within a certain time, and has done so in the past, failure to act within the prescribed time can constitute a change in voting. "Indeed, if § 5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining" to act as they had done so in similar situations in the past. *Hathorn v. Lovorn, Supra* at 265 n. 16.

ARGUMENT II

A VOTING RIGHTS CASE IS NOT MOOT WHERE THE CLAIM FOR ATTORNEY FEES IS STILL PENDING?

Appellees' reliance upon *Berry v. Doles*, 438 U. S. 190, to make its case for mootness is misplaced. That

case involved a finding by the District Court of a violation of Section 5 but there was a refusal by the District Court to allow a remedy for the past violation. This court, subsequently, reversed that holding.

The present case is one where appellees failed to seek § 5 preclearance abolishing the town marshall position for twelve (12) years, his duties being assigned to the police chief. Eight months after this action was filed, appellees sought preclearance. Appellees suggest that appellants must obtain a declaratory judgment in order to be considered prevailing parties for purposes of having a presently existing claim. The claim which presently exists is one for attorney fees and thus this action is not moot. This court recently has held in *Hewitt v. Helms*, 482 U. S. 755, 761, 762:

> "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment — e. g., a monetary settlement or a *change in conduct that redresses the plaintiff's grievances*. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. See *Maher, Supra,* at 129, 65 L. Ed. 2d 653, 100 S. Ct. 2570. . . Redress is sought through the court, but from the defendant.

The court went on to state that. . . "if the defendant under the pressure of a lawsuit alters his conduct towards the plaintiff, the plaintiff will have prevailed. Id. at 761.

The salient fact concerning this entire controversy is the fact that for twelve (12) years, appellees failed to obtain preclearance with respect to the town marshall position but that after this lawsuit was filed preclearance was then requested i.e. appellees altered their conduct under the pressure of this instant action.

CONCLUSION

The questions presented by appellants are substantial and this court should deny appellees' Motion to Dismiss or Affirm and note probable jurisdiction and reverse the three-judge panel.

Respectfully submitted,

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